BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CHRISTINA B. and LAKISHA B. , Claimant, vs. NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH Nos. 2010071230 & 2010071228

DECISION

The hearing in the above-captioned matters was held on March 29, 2011, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings. Two cases were tried together, as the Claimants are siblings, and because the cases presented common issues of law and fact.

Case number 2010071230 pertains to Claimant Christina B., and case number 2010071228 pertains to Claimant Lakisha B. The two Claimants were represented by their mother, Patricia C.[1] The Service Agency, North Los Angeles County Regional Center (NLARC or Service Agency) was represented by Ruth Janka, Contract Administrator.

Evidence was received, the case argued, and the matter submitted for decision on the hearing date.

The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

[1] Initials are used in the place of surname in the interests of privacy.

ISSUE PRESENTED

May the Service Agency reduce or eliminate funding for day care services provided to the two Claimants on the basis that Adoptions Assistance Program funds are available to provide such supports?

FACTUAL FINDINGS

The Parties, Procedural History, and Jurisdiction

1. Claimants are sisters, residing in the Service Agency's service catchment. Claimant Christina B. (Christina) is a 19-year-old woman, her sister Lakisha B. (Lakisha) is 17.[2] Both Claimants are eligible to receive services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.[3]

2. Christina is eligible for services because she suffers from Cerebral Palsy, Mild Mental Retardation, and Autism. (Ex. 9, p. 1.) Lakisha's eligible conditions also include Cerebral Palsy and Mental Retardation, but she has been diagnosed as severely retarded. She has a third eligible condition, Epilepsy. (Ex. 11.)

3. The Service Agency issued a Notice of Proposed Action (NOPA) to each Claimant on June 3, 2010, each of which stated that effective July 3, 2010, daycare services would be terminated. Claimant's mother filed a Fair Hearing Request for each Claimant on or about July 13, 2010. The June 2010 NOPA's stated that the reason for the proposed action was that there had been a failure to provide information needed to assess the Claimants' needs.

4. (A) Thereafter, meetings took place between Claimants' mother and Service Agency representatives, and information was provided to the Service Agency. On or about February 18, 2011, a new NOPA was issued to each Claimant. These have been deemed to supersede the 2010 NOPA's referenced above.

(B) The action identified in each of the 2011 NOPA's was termination of all day care services when Claimants' parent was not working, and termination of a portion of the services provided for Claimant Christina when the parent was employed. Subject to verification regarding her employment, the Service Agency

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[2] Christina was born on April 12, 1992, and Lakisha on October 28, 1993.

[3] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

took the position it would pay not for day care above and beyond 25.5 hours per month for Christina, and 7.75 hours per week for Lakisha.

(C) The reason stated for the proposed action was that the Lanterman Act required pursuit of all sources of income, and that AAP (Adoptions Assistance Program) funds were available and specifically meant to be used for care and supervision.

5. Claimants' mother did not file another fair hearing request; the parties deemed her to object to the 2011 NOPAs, especially as the fair hearing had already been scheduled. The parties did participate in an informal hearing, which occurred on or about March 17, 2011. However, the parties could not reach agreement, and the hearing in this matter ensued. All jurisdictional requirements have been met.

Claimants' Programs

6. (A) Claimants live with their adoptive mother, Mrs. C., in a single family residence.[4] Mrs. C. has cared for the girls for most of their lives; they are her nieces. She was a foster mother to them before she adopted them in approximately 2005.

(B) According to her last Individual Program Plan (IPP), which was prepared in May 2010, Christina, then 18, suffered from significant limitations. She could feed herself with a spoon, with spillage, but did not always chew her food, which threatened her with choking. She could generally use the toilet, though she needed help afterwards, and she would, on an approximately weekly basis, have a bowel movement while riding the bus to or from school. She is non-verbal, not always able to show her wishes. She was unable to tend to personal hygiene, and could not bathe herself or shower. On occasion she would hit or lash out at others, and had no safety awareness. For this and other reasons, she needs constant supervision. (Ex. 3.)

(C) Lakisha's last IPP (January 2010, with addendums) describes her as non-ambulatory but able to use her fingers, hands, and upper extremities. She is fully dependant on others for dressing, toileting, and personal care. She is non-verbal and not always able to express her wants otherwise. She can maintain a sitting position with minimal support for approximately five minutes. She often becomes hostile, and had repetitive body movements. She uses diapers, and consumes several cans of pediasure per day. (Ex. 2.) According to other documentation, she has a G-tube, and she needs oxygen, and suctioning, several times per day. She suffers from heart problems as well. (Ex. 11.)

[4] There is an indication in Lakisha's records that her great aunt lived with Claimants and Mrs. C. in 2010, but Christina's records did not mention that living arrangement. (Compare Ex. 2, p. 3 with Ex. 3, p. 2.)

(D) Lakisha has significant medical problems. She suffers from Hypoplastic Left Heart Syndrome and Aortic Stenosis. She must be fed pediasure through the G-tube, and she requires the administration of oxygen several times per day. (Ex. 11.)

7. The Claimants have been receiving a wide array of services, including special education from their local school district, LVN-level respite care, LVN level day care, and LVN-level personal assistant care. Diapers are being provided for Lakisha, along with oxygen and pediasure. Many of these supports or services are provided by agencies other than the Service Agency; for example, Medi-Cal or California Children's Services are providing some of the specialized medical supports.

8. As noted above, much of the service provided to Lakisha is LVN-level. This is because Lakisha's needs are such that a person with medical training must assist her. Claimant's G-tube must be cleaned, she must receive medications, and she must have oxygen administered. Someone must monitor her heart. She must have close supervision vis-à-vis her sister, who sometimes will pull at Lakisha's tubes. In January 2011, Christina pulled out Lakisha's G-tube, which put the latter in the hospital for approximately four days. Christina does not have medical needs as significant as her sister, though she is taking several medications and those must be administered appropriately.

Adoption Assistance Benefits

9. Prior to adopting Claimants, Mrs. C. took steps to obtain Adoption Assistance Benefits (AAP) for the two girls. Those benefits are funded through the counties from a state agency, the Department of Social Services. In the case of the Claimants, the Los Angeles County of Childrens and Family Services (DCFS) requested that the Service Agency evaluate the Claimants to see what it would cost to house the Claimants in a licensed facility. Essentially, the more severe their problems, the more intensive would be the supports at a facility, if they proposed adoptees were placed in a group facility. For example, a child with severe behavioral issues would be housed at a facility that could provide one-to-one supervision; that would be more expensive than a facility that would be provided for a child with minimal needs. That facility rate would be taken into account when a grant of AAP benefits was considered. This process was known as generating an ARM-rate letter.

10. In 2004 the Service Agency provided that assessment, via an ARM rate letter, for each of the Claimants. Lakisha was rated at level 2, for a rate of $1694 per month in June 2004. (Ex. 11; see Ex. 6 at June 11, 2004 entry.) Apparently the initially-assessed rates were not satisfactory to Mrs. C., and some other rate was eventually negotiated for each child. (See, e.g., Ex. 6, at the June 11, 21, & 29, 2004 entries.)

11. The evidence establishes that at this time the AAP benefit for Lakisha is $4,386 per month, and for Christina the benefit is $3,134 per month. (See Ex. 4; see also the February 18, 2011 letters contained in Ex. 1, at page 2 of each.) It should be noted that this reflects the disabilities of the Claimants, because the base rate that would otherwise be paid, if the two were not disabled, would be the AFDC rate of $597 per month per consumer. (Ex. 4.)

The Need for Daycare

12. Mrs. C. does not have a full-time job. When she does work, she works as a vocalist in jazz or blues bands. There is inconsistent evidence about how much Mrs. C. earns as a musician. Claimants' service coordinator, Mr. Robinson, understood that it averaged $400 per month; he gained that understanding when meeting with Mrs. C. in May 2010 to assess the need for day care and other services. Mrs. C. denies providing such a figure. During her testimony she stated that every job is different, and that she might make $50 one night, and $150 another. She also testified that she earned approximately $1,100 during the last year by working as a musician.

13. Heretofore, the Service Agency has provided 36 hours per week of day care, at the sibling rate. The sibling rate means that one person is paid to look after both Claimants, and paid somewhat more than would be paid for caring for just one at a time. As previously noted, the care is LVN-care, meaning it is provided by someone who is a licensed vocational nurse.

14. The 36 hours per week of care was provided so that Mrs. C. would have three nights per week available, on the weekends, to attend to her music. According to the IPP documents, this was to be allocated in 12-hour blocks on Friday, Saturday, and Sunday. (Ex. 2, p. 5; Ex. 3, p. 4.)

15. Mrs. C. does not work all three nights during a given week. In those circumstances, the need for daycare is lessened. It is reasonably inferred that there may be some nights when she does not need to utilize all 12 of the allotted hours, such as where a particular performance is relatively near her home.

Family Expenses

16. Mrs. C. provided budget information to the service coordinator, Mr. Robinson, in May 2010. Those monthly expenses included $1,541 for the mortgage on the family home; $688 for water, gas, and electricity; $400 for food and $300 for phones; $1,317 for car payments (on two cars); $150 per month for gas for the cars, $143 for cable and $253 for employment expenses. Mrs. C. indicated she was trying to set aside $2,000 per month for an emergency trust fund for Lakisha, and that there were other occasional expenses, such as clothing and entertainment, which, in some

months, amounted to another $415 per month. Thus, the monthly expenses, less the proposed trust fund, are $4,744 per month. (See Ex. 4.)

17. The record is not completely clear as to the cost of the LVN day care. In a decision letter following the informal hearing, Ms. Janka stated that the cost, for Lakisha, is $2,377.50, which is inferred to be a monthly figure. (See Ex. 1, at p. 4 of the letter, dated March 17, 2011.) If that is the case, the costs is approximately $16 per hour. ($2377.50 divided by 144 hours.) In her letter regarding Christina, also part of Exhibit 1, Ms. Janka asserts that day care could be obtained at the minimum wage rate of $8.00 per hour, for a monthly cost of $1,238.40 ($288 per week). (See p. 4.) However, there was evidence that the sibling rate would provide some savings; it is inferred that the total cost of day care for both Claimants at this time is less than the sum of $2,377.50 and $$1,238.40.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 5.

2. Services under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See § 4710.5, subd. (a); see also, § 4646, subd. (g).)

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), and 4648, subds. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2), 4648, subds. (a)(1) & (a)(2).)

4. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many consumers and families.

5. (A) Section 4512, subdivision (b), of the Lanterman Act provides, in pertinent part, that

> "Services and supports for person with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, *day care*, . . . physical, occupational, and speech therapy, . . . habilitation, . . . recreation, . . . camping, community integration services, . . . respite, . . .
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> (Emphasis added.)

6. A statutory definition of day care is found in section 4686.5, at subdivision (a)(4). There it is stated: "For purposes of this section 'day care' is defined as regularly provided care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parent is engaged in employment outside the home or educational activities leading to employment, or both." While the statute itself focuses on respite care, and bars the use of day care funding to provide respite care, the definition is of some utility in this case.

7. The Lanterman Act has long called for the use of generic resources to assist in meeting the needs of developmentally disabled persons. Thus, for example, it looks to public schools to provide education, and government programs such as Medicare to provide other needed services, and Social Security to provide monies that might be used for the benefit of consumers. (See section 4659.) Section 4646.4 was enacted to further that goal. That relatively new statute requires the pursuit of generic resources, private funding such as insurance, and consideration of family responsibility for providing services and supports for non-disabled children.

8. In recent years, the Legislature has taken steps to reduce the obligation of the regional centers to pay for day care. For example, it enacted section 4685, which states, at subdivision (c)(6):

> When purchasing or providing a voucher for day care services for parents who are caring for children at home, the regional center may pay only the cost of the day care service that exceeds the cost of providing day care services to a child without disabilities. The regional center may pay in excess of this amount when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

9. Section 4685, subdivision (c)(6) thus dovetails with provisions of section 4646.4, and stands for the proposition that every parent has some day-care obligation, and absent some demonstrated financial hardship, must share the cost of providing day care for their disabled child.

10. Because of the fact that the Claimants receive AAP benefits there are other statutory considerations. As noted by the Service Agency, section 4684, subdivision (d)(2) provides that AAP benefits shall be utilized "for care and supervision, as defined in subdivision (b) of Section 11460, and the regional centers shall separately purchase or secure other services contained in the child's IFSP or IPP pursuant to sections 4646 to 4648, inclusive, 4585, and Sections 95018 and 95020 of the Government Code." Section 4684 was intended to have retroactive effect, that is, to apply to persons receiving AAP benefits where the benefit rates were established prior to the enactment of section 4684. (§ 4684, subd. (e).)

11. Section 11460, subdivision (b), referenced in section 4684, subdivision (d)(2), provides that "'care and supervision' includes food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation."

12. The Service Agency is correct when it asserts that sections 4684, subdivision (d)(2), and 11460, subdivision (b), when read together, require Claimants' mother to utilize the AAP benefits for the bulk of the Claimant's expenses, including supervision when she is rehearsing or performing, that is, when she is working at her chosen profession.

13. Based on all the foregoing, the Claimants' appeals must be denied, and the Service Agency's proposed action sustained.

ORDER

The appeals of Claimants Lakisha B. and Christina B. are hereby denied, and the proposed action by the Service Agency sustained. It may terminate or reduce day care funding for each Claimant in accordance to the action proposed in the February 18, 2011 NOPA and accompanying letter.

May 13, 2011

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.